ADNAN MAT JIDIN & ANOR.

v.

IRWAN WEE ABDULLAH & ANOR.

COURT OF APPEAL, KUALA LUMPUR
GOPAL SRI RAM JCA
NH CHAN JCA
MOKHTAR SIDIN JCA
[CIVIL APPEAL NO: W-02-248-1994]
30 APRIL 1997

TORT: *Vicarious liability - Road accident - Motorcar - Owner and driver - Whether owner vicariously liable for negligence of driver*

TORT: *Vicarious liability - Nature and scope of doctrine - Whether ownership per se renders owner of car liable for negligence of driver - Whether mere permission or consent to use car sufficient to establish liability - Whether driver must be an agent of owner - Whether there must be a delegation of task or duty - Qui facit per alium, facit per se*

TORT: *Statutory bars to action - Married Women Act 1957, s. 9(2) - Whether an absolute bar*

The two appeals herein before the instant Court emanated from a decision of the High Court in a personal injury action. The principal issues that arose for decision concerned: (i) the interpretation of s. 9(2) of the Married Women Act 1957 ('the Act'); and (ii) the operation of the doctrine of vicarious liability.

Held:
Per Gopal Sri Ram JCA

[1] The language of s 9(2) of the Act ought to receive an interpretation which is plain on its face, ie, that except for the protection or security of his or her property **no** husband or wife shall be entitled to sue the other for a tort.

[2] Although there is some force in saying that the fact of ownership is a valuable consideration in determining whether or not a driver of a car is driving independently or for and on behalf of the owner, it would be surprising that that fact alone could saddle the owner with liability. It has **never** been the law that the owner of a car is responsible in law for damage arising from the negligence of a person to whom he has lent the car or whom he has permitted the use of the car.

[2a] The driver of the car must be doing something for the owner of the car in order to become an agent of the owner; the mere fact of consent by the owner to the use of the chattel is **not** proof of agency. Liability depends **not** on ownership but on the delegation of a task or duty. There has to be an acceptance by the agent of a mandate from the principal though neither the acceptance nor the mandate has to be formally expressed or legally binding.

[2b] The legal principle of vicarious liability for the negligent driving of a car by another person is the principle *qui facit per alium, facit per se.*

[2c] The test of vicarious liability in such cases is **not** the 'interest and concern' argument. Mere permission is **not** sufficient to establish vicarious liability. The owner of a car is vicariously liable if: (i) the owner has authorised or requested the act; (ii) the driver is carrying out a task or duty delegated to him by the owner; or (iii) the owner is in control of the driver's conduct. The owner is **not** vicariously liable just because he has permitted the use of the car and has an interest or concern in the purpose for which the car is being used.

[Order accordingly.]

*[**Bahasa Malaysia** Translation of Headnotes]*

***TORT:** Liabiliti vikarius - Kemalangan jalanraya - Kereta - Tuanpunya dan pemandu - Samada tuanpunya bertanggungan secara vikariusnya atas kecuaian pemandu*

***TORT:** Liabiliti vikarius - Sifat dan bidang doktrin - Samada pemunyaan per se menjadikan pemilik kereta bertanggungan bagi kecuaian pemandu - Samada kebenaran semata-mata atau persetujuan untuk menggunakan kereta cukup untuk menentukan tanggungan - Samada pemandu mestilah menjadi ejen pemunya - Samada seharusnya berlaku perwakilan tugas atau kewajipan - Qui facit per alium, facit per se*

***TORT:** Halangan-halangan statutori kepada tindakan - Akta Wanita Berkahwin 1957, s. 9(2) - Samada merupakan halangan yang mutlak*

Kedua-dua rayuan di sini yang di hadapan Mahkamah ini bermula daripada keputusan Mahkamah Tinggi dalam satu tindakan kecederaan diri. Isu-isu utama yang berbangkit untuk mendapatkan keputusan berkaitan dengan: (i) pentafsiran s. 9(2) Akta Wanita Berkahwin 1957 ('Akta tersebut'); dan (ii) pengendalian doktrin tanggungan vikarius.

Diputuskan:
Oleh Gopal Sri Ram HMR

[1] Bahawa s. 9(2) Akta tersebut seharusnya diberikan pentafsiran yang jelas dan menyeluruh, iaitu bahawa melainkan bagi perlindungan atau jaminan hartanahnya **tiada** satu pun pihak, suami atau isteri yang berhak untuk mendakwa pihak yang lain bagi mendapatkan tort.

[2] Walaupun terdapatnya kuasa yang menyatakan bahawa fakta keempunyaan adalah satu pertimbangan yang amat bernilai dalam menentukan sama ada pemandu sesebuah kenderaan sedang memandu secara bebas atau untuk dan bagi pihak pemunya kenderaan itu, ianya akan menjadi sesuatu yang menghairankan bahawa fakta itu sendiri boleh menyebabkan pemunya bertanggungan. Adalah tidak pernah menjadi undang-undang bahawa pemunya kenderaan adalah bertanggungjawab di sisi undang-undang bagi gantirugi yang berbangkit daripada kecuaian seseorang kepada siapa beliau telah meminjamkan kenderaan itu atau kepada siapa beliau telah memberikan kebenaran untuk mengguna kenderaan itu.

[2a] Pemandu kereta itu semestinya melakukan sesuatu bagi pemunya kereta itu untuk beliau menjadi ejen pemunya kereta tersebut; fakta kebenaran semata-mata oleh pemunya bagi penggunaan catel itu bukannya merupakan bukti ejensi. Tanggungan bergantung bukan pada keempunyaan tetapi atas perwakilan sesuatu tugas atau kewajipan. Terdapat penerimaan oleh ejen akan mandat daripada pihak utama walaupun mandat atau penerimaan itu tidak secara rasminya dinyatakan atau mengikat dengan cara yang sah di sisi undang-undang.

[2b] Prinsip sah tanggungan vikarius bagi memandu kereta dengan cuainya oleh seorang yang lain adalah prinsip *qui facit per alium, facit per se.*

[2c] Ujian tanggungan vikarius dalam kes-kes yang sedemikian bukannya merupakan penghujahan "kepentingan dan yang diambil berat". Kebenaran yang diberikan semata-mata tidak mencukupi untuk menentukan tanggungan vikarius. Pemunya seseorang kereta akan bertanggungan secara vikarius jika (i) pemunya tersebut telah membenarkan atau meminta dilakukan perbuatan itu; (ii) pemandu tersebut sedang menjalankan tugas atau kewajipan yang telah diwakilkan kepada beliau oleh pemunya tersebut; (iii)pemunya mengawal kelakuan pemandu. Pemunya tidak bertanggungan secara vikarius semata-mata kerana beliau telah membenarkan penggunaan kereta dan mempunyai kepentingan atau mengambil berat dalam tujuan sebenar kereta itu telah dipergunakan.

[Perintah sehubungannya.]

Cases referred to:
Mohamed Habibullah v. Faridah bte Dato Talib [1993] 1 CLJ 264 ***(foll)***
Karthiyayani & Anor. v. Lee Leong Sin & Anor. [1975] 1 MLJ 119 ***(foll)***

Legislation referred to:
Married Women Act 1957, s. 9(2)

[Appeal from High Court Malaya, Kuala Lumpur; Civil Suit No: S5-23-91-90]

Civil Appeal No. W-02-248-94
For the appellant - Khoo Eng Chin (Andrrew Khoo with him)
For the defendant - B.S. Sidhu (Sharon Sidhu with him)

Civil Appeal No. W-02-249-94
For the appellant - B.S. Sidhu (Sharon Sidhu with him)
For the defendant - Khoo Eng Chin (Andrew Khoo with him)

JUDGMENT

Gopal Sri Ram JCA:

There are two appeals before us. They are Civil Appeal No. W-02-248-94 ('the first appeal') and W-02-249-94 ('the second appeal'). Both arise from a decision of the High Court in a personal injury action. Because of the logical sequence of the arguments relevant to the issues before us, we will deal with the appeals in reverse order.

The second appeal is brought by Adnan Hj. Mat Jidin and Normala Ismail who were plaintiffs in the Court below. Irwan Wee Abdullah and Foong Siew Leng who were the defendants in the Court below are respondents in the second appeal. In the first appeal the roles are reversed, the appeal being that of the defendants. For convenience, we will refer to the parties as plaintiffs and defendants and in the order in which they appear in the title to the action.

The facts relevant to both appeals are fairly straightforward and may be shortly stated. On 11 October 1989, the second plaintiff was riding pillion on a motor-cycle of which the first plaintiff was the rider. There was a collision between their motor-cycle and a motor car owned by the second defendant and driven by the first defendant who was, at the material time, the husband of the second plaintiff. The plaintiffs brought an action claiming that the accident had been caused by the negligence of the first defendant. They also sought to make the second defendant vicariously liable for the first defendant's negligence.

The defendants, in answer to the second plaintiff's action pleaded s. 9(2) of the Married Women Act 1957 which, prior to its amendment in 1994, read as follows:

(2) Except for the protection or security of his or her property no husband or wife shall be entitled to sue the other for a tort.

The learned Judge who tried the action held the subsection to be an absolute bar to the second plaintiff's claim against her husband, the first defendant. He dismissed her claim for that reason. This forms the subject matter of the second appeal.

Before us, Encik Sidhu of Counsel for the plaintiffs sought to argue around s. 9(2). But the language of the section is so plain that it makes the point quite unarguable.

That the language of the subsection ought to receive an interpretation which is plain on its face is made clear by the decision of the Supreme Court in *Mohamed Habibullah v. Faridah Dato Talib* [1993] 1 CLJ 264, where Harun Hashim SCJ said (at p. 272):

> The cause of action in the present case is clearly a tort. If the allegations of assault and battery can be proved, this may be the subject of criminal proceedings against the defendant but this fact stands independently from an action in tort. **As the plaintiff and defendant are husband and wife and the allegations of assault and battery constituting the tort are not related to the protection or security of property, the plaintiff is barred by s. 9(2) of the Married Women Ordinance from suing the defendant.** Section 9(2) therefore applies and the High Court is in error in deciding that it did not. (Emphasis added.)

It is beyond argument that the second plaintiff's claim in her action was based on the tort of negligence. In our judgment, the learned Judge was therefore entirely right in dismissing her claim against her husband as well as against the second defendant.

We now turn to deal with the claim of the first plaintiff which forms the subject matter of the first appeal. The learned Judge held both the first plaintiff and the first defendant equally to blame for the collision. He also held the second defendant to be vicariously answerable for the first defendant's negligence. He made an award of damages which included compensation for loss of future earnings. The second defendant complains that the formula applied by the learned Judge is not in accordance with the relevant provisions of the Civil Law Act 1956 and asks that the figure be reduced.

Encik Khoo Eng Chin of Counsel for the defendants attacked the finding of the learned Judge against the second defendant on the basis of vicarious liability. He drew our attention to passages in the evidence to demonstrate that the facts of the present case do not admit the operation of the vicarious liability doctrine. That doctrine, in so far as it applies to agency relationships was stated with such clarity by Raja Azlan Shah FJ (as he then was) in *Karthiyayani*

a *& Anor. v. Lee Leong Sin & Anor.* [1975] 1 MLJ 119, 121 that we find it necessary to quote *in extenso* from his judgment:

> Although there is some force in saying that the fact of ownership is a valuable consideration in determining whether or not the driver is driving independently or for and on behalf of the owner, it would be surprising that that fact alone *b* could saddle the owner with liability. It has never been the law that the owner of a car is responsible in law for damage done by the negligence of a person to whom the car is lent or whom he has permitted to use it. Singleton LJ said this in *Ormrod v. Crosville Motor Services Ltd.* [1953] 2 All ER 753 (at p. 754):
>
> > It has been said more than once that a driver of a motor car must be *c* doing something for the owner of the car in order to become an agent of the owner. The mere fact of consent by the owner to the use of the chattel is not proof of agency ...
>
> Any other view would be tantamount to saying that *Hewitt v. Bonvin* [1940] 1 KB 188 was wrongly decided. And that case was approved by the Privy Council *d* in *Rambarran v. Gurrucharran* [1970] 1 All ER 749. In my view the legal principle was correctly stated by MacKinnon LJ in *Hewitt v. Bonvin* (p. 191):
>
> > If A suffers damage by the wrongful act of B, and seeks to say that C is liable for that damage he must establish that in doing the act B acted as the agent or servant of C. If he says that he was C's agent he must *e* further show that C authorised the act. If he can establish that B was the servant of C the question of authority need not arise.
>
> Du Parcq LJ in that case put the matter in the following way (p. 194):
>
> > The driver of a car may not be the owner's servant, and the owner will *f* be nevertheless liable for his negligent driving if it be proved that at the material time he had authority, express or implied, to drive on the owner's behalf. Such liability depends not on ownership but on the delegation of a task or duty ...
>
> The reasoning in *Ormrod's* case is based on the same principle. Pearson LJ in *g* *Norton v. Canadian Pacific Steamships Ltd.* [1961] 2 All ER 785 said (p. 790):
>
> > The owner of a car when he takes or sends it on a journey for his own purposes, owes a duty of care to other road users, and if any of them suffers damage from negligent driving of the car, whether by the owner himself or by an agent to whom he has delegated the driving, the owner *h* is liable.
>
> Sachs LJ in *Vandyke v. Fender* [1970] 2 All ER 339 said of *Ormrod's* case:
>
> > Ever since the decision of this Court in *Ormrod v. Crosville Motor Services Ltd. (supra)* it has been considered clear that where the owner of the car has authorised a driver to drive a car, and has an interest in *i*

one of the objects of the particular journey, the driver is his agent when driving.

From the above authorities it can be said without fear of contradiction that the legal principle of vicarious liability for the negligent driving of a car by another person is the principle *qui facit per alium, facit per se*. I cannot put the matter better or more tersely than as I found it put by Lord Pearson in his speech in *Morgans v. Launchbury* [1972] 2 All ER 606:

> If the car is being driven by a servant of the owner in the course of the employment or by an agent of the owner in the course of the agency, the owner is responsible for negligence in the driving. The making of the journey is a delegated duty or task undertaken by the servant or agent in pursuance of an order or instruction or request from the owner and for the purposes of the owner. For the creation of the agency relationship it is not necessary that there should be a legally binding contract of agency, but it is necessary that there should be an instruction or request from the owner and an undertaking of the duty or task by the agent. Also the fact that the journey is undertaken partly for the purposes of the agent as well as for the purposes of the owner does not negative the creation of the agency relationship. *Hewitt v. Bonvin, Ormrod v. Crosville Motor Services Ltd., Hilton v. Thomas Burton (Rhodes) Ltd.* [1961] 1 All ER 74, *Norton v. Canadian Pacific Steamships Ltd.* and *Klein v. Caluori* [1971] 2 All ER 701. I think there has to be an acceptance by the agent of a mandate from the principal though neither the acceptance nor the mandate has to be formally expressed or legally binding.

It can therefore be seen that the test of vicarious liability in such cases as the present is not the 'interest and concern' argument. The principle that the owner of a car is vicariously liable for the user of it by someone whom he has permitted to use it if he has an interest or concern in the purposes for which it is being used, is not only unsatisfactory but unwarranted. Every person who permits another to use his car may be said to have an interest or concern in the car being carefully used and in most cases to have an interest or concern in the safety of the driver but it has never been the law that mere permission is sufficient to establish vicarious liability. A person who permits another to use his car does not become the former's agent if on his own volition he uses it for the owner's benefit, e.g., a person using his brother's car with permission does not become the latter's agent because, remembering that the latter has a luggage at the shop he uses the car to collect it. If the journey is at the owner's own request as in *Ormrod's* case or where the owner asks his brother to bring the car to the railway station to meet him, then the driver can be said to do an act for the owner and acting as his agent. **The owner is liable because he has authorised or requested the act or because the driver is carrying out a task or duty delegated to him, or because he is in control of the driver's conduct. He is not liable just because he has given permission to use the car, and has an interest or concern in the purpose for which the car is being used.** The phrase *qui facit per alium, facit*

per se correctly expresses the principle governing vicarious liability. (Emphasis added.)

We are in agreement with Encik Khoo's submission that the evidence in the present case falls short of the test propounded by Raja Azlan Shah FJ in the passage to which we have lent emphasis. Here we have evidence of permission of user and nothing else. That, on the authorities is quite insufficient.

In respect of the complaint that the compensation awarded for loss of future earnings was excessive, Encik Khoo Eng Chin suggested a multiplier of 111/3 and a multiplicand of RM400. We found this entirely in keeping with the provisions of the Civil Law Act 1956.

As regards the challenge directed against the apportionment of liability, we formed the view that this was a pure question of fact based upon the credibility of the witnesses seen and heard by the learned Judge. In accordance with settled principles, it is not proper for this Court to intervene upon such matters. We formed the same view in respect of the award made by the learned Judge in respect of general damages for the injuries sustained by the first plaintiff.

For the reasons given, we made the following orders in respect of each appeal:

(1) The first appeal was allowed to the extent:

(a) that the learned Judge's finding that the second defendant was vicariously liable was set aside; and

(b) that the award for loss of future earnings was reduced to the product of the multiplier and multiplicand earlier referred to.

Taking into account all the circumstances of the case, we made no order as to costs and directed the deposit paid into Court be refunded to them.

(2) In respect of the second appeal, we dismissed the appeal of the first plaintiff against the apportionment of liability and quantum. In respect of the second plaintiff, we dismissed her appeal against the order of the trial Judge denying her relief by reason of s. 9(2) of the Married Women Act 1957. As in the first appeal, we made no order as to costs and directed that the deposit paid into Court be refunded to the plaintiffs.

Reported by Alex KC Lee